> doubt the deed was not prepared in the exact manner which he intended, then the deed may be reformed, and those particular provisions necessary to carry out his intention into effect may be introduced.

In *Weir* v *Van Tromp*,[29] Byrne J applied the law as stated by Lord Romilly. Part of his reported judgment reads:

> ... yet he [the judge] ought not to act upon any but the clearest and most certain demonstration of error and of actual intention, and it was not immaterial to observe that he had not been referred to any reported case where judgment had been given in favour of reforming a voluntary settlement at the instance of a volunteer.

The standard of proof as laid down in the authorities is 'beyond all doubt' or 'the clearest and the most certain demonstration of error'. There must be 'strong irrefragable evidence' and as stated in *Snell*'s, 'This heavy burden of proof becomes even more difficult to discharge with the passage of the years.' Here, the plaintiff has made a valiant effort to discharge the burden 100 years after the first settlement was made and 80 years after the death of Syed Shaikh. He cannot possibly succeed on the claim for rectification when, on the same evidence, he has failed on the issue of construction. This conclusion also applies to the rectification action in OS No 936/86.

For the above reasons, I dismiss these two actions, both on construction and on rectification. I will now hear submissions on costs.

Applications dismissed.

Solicitors: *B Mohan Singh & Co*; *Wee Swee Teow & Co*; *G Raman & Partners*; *Leo Fernando*.

Reported by *Terence Tan Bian Chye*

British & Malayan Trustees Ltd v Abdul Jalil bin Ahmad & Ors

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 387 OF 1990
THEAN J
15 NOVEMBER 1990

Trusts and Trustees — Sale of trust property — Application by trustees to court to order sale of trust property — Whether court has power to order sale where trust instrument expressly excluded power of trustees to apply for court order — Settled Estates Act (Cap 293, 1985 Ed), ss 4 & 6 — Trustees Act (Cap 337, 1985 Ed), ss 2(2) & 59

The plaintiffs are the trustees of a settlement. They applied for an order authorizing the sale of land and premises belonging to the trust ('the property'). The reasons for this were that the rental income from the property produced a very low rate of return, there were rising maintenance costs of the property, and as the property was relatively underdeveloped, there was also a strong possibility of compulsory acquisition. The plaintiffs were thus of the opinion that the property should be sold and the proceeds reinvested in first-class residential and/or commercial property. The second, third, seventh and eighth defendants opposed the making of the order. The issue was whether the court has power to order the sale of the property under s 4 of the Settled Estates Act.

Held, dismissing the application:

(1) However the property was acquired, it had been treated as settled property within the terms of the settlement, and in particular, the rental income from the property had been treated as income and distributed according to the trusts under the settlement. As such, the property was part of the settled estates under s 2 of the Settled Estates Act (Cap 293, 1985 Ed).

(2) Section 4 of the Settled Estates Act conferred on the court a power to order the sale of the whole or any part of the settled estates if it is considered proper and consistent with due regard for the interests of all parties entitled under the settlement. Section 6 however restricted this power to the extent which the sale of the property might have been authorized in and by the settlement of the settlor.

(3) Clauses 7 and 16 of the settlement made it clear that the settlor intended that the trustees should have no power, except to a limited extent, to sell the property, and further that the trustees were forbidden to invoke the jurisdiction of the court and to seek an order for the sale of settled property. Section 6 could not therefore come into effect.

(4) The court could under s 59 of the Trustees Act (Cap 337, 1985 Ed) confer on the trustees power to dispose of trust property, but this power was limited by s 2(2) of this Act. Clauses 7 and 16 showed a contrary intention expressed in the trust instrument such that the power of the court to order a sale under s 59 of the Trustees Act could not be invoked.

Case referred to

1 *Chapman* v *Chapman* [1954] AC 429 (distd)

Legislation referred to

Settled Estates Act (Cap 293, 1985 Ed) ss 4, 5, 6
Trustees Act (Cap 337, 1985 Ed) ss 2(2), 59
Civil Procedure Code (No XXXI of 1907) ss 1041, 1043

Settled Estates Act 1856 [UK] 19 & 20 Vict c 120 ss XI, XXVII
Settled Estates Act 1877 [UK] 40 & 41 Vict c 18 ss 16, 38, 39

KS Lo (*Lim Soo Peng* with him) for the plaintiffs.
Aloysius Leng for the first defendant.
Harry Elias (*TA Karthigesu* with him) for the second defendant.
The third defendant in person.
TPB Menon for the fourth defendant.
The seventh defendant in person.
The eighth defendant in person.
Michael Khoo Kah Lip for the ninth defendant.

Cur Adv Vult

Thean J: British & Malayan Trustees Ltd are presently the trustee ('the trustee') of a settlement created by an indenture dated 7 October 1933 between the settlor, Shaik Sallim bin Mohamed bin Sallim bin Talib ('the settlor') of the first part, the settlor and Shaik Abdullah of the second part and Shaik Mohsin of the third part. I shall refer to this indenture as 'the settlement'. In these proceedings, the trustee applies under s 4 of the Settled Estates Act (Cap 293, 1985 Ed) and s 59 of the Trustees Act (Cap 337, 1985 Ed) for an order authorizing the sale of the land and premises marked on the government resurvey map as lot 524 of town subdivision 25, which has a land area of 16,978.0 sq m. On the land were built seven blocks of three-storey apartments and a row of garages; there are altogether 60 apartments and 30 garages. I shall refer to the land and premises as 'the property'. At the initial stage of the application, various orders and directions were made, including the addition of the necessary parties as defendants in these proceedings. In particular, orders were made for the first defendant to be joined as a party representing himself and 59 named income beneficiaries, for the second defendant to be joined as a party representing himself and 14 other named income beneficiaries and for Mr Michael Khoo to be appointed to represent all the corpus beneficiaries under the settlement. All those income beneficiaries, who do not wish to be represented by either the first or the second defendant, are joined as parties to these proceedings. There are now before me all the parties who have an interest in the settlement.

By the terms of the settlement, the settlor revoked the trusts, which he had created in respect of certain immovable properties, and settled two formidable lists of immovable properties described in the first and second schedules to the settlement in trust for himself during his life and after his death in trust, as to the net income from the settled properties, for the beneficiaries named or described therein, ie the income beneficiaries under cl 3 of the settlement, during 'the period of settlement' (as defined in cl 3), and after the expiration of the period of settlement in trust for the beneficiaries under cl 6, ie the corpus beneficiaries.

The property is not one of the immovable properties described in the first schedule or the second schedule to the settlement. It was acquired out of the capital moneys paid upon compulsory acquisition of some immovable properties comprised in the settlement. Linda Ho, the assistant manager of the trustee, in para 4 of her affidavit affirmed on 22 April 1990 said:

> The property which is the subject of the present application — lot 524 of town subdivision 25 (No 7, Orange Grove Road) (hereinafter referred to as 'the property') — was purchased in 1952/1953 by the then trustees of the family settlement with capital moneys arising from compulsory purchase or acquisition of settled property and comes within the family settlement by virtue of the definition. 'The settled property' in cl 1 which states that expression means also 'any immovable property purchased with such money . . . by the trustees'. The purchase price paid by the then trustees was $500,000. The property was then developed by the then trustees and seven three-storey walk up apartment blocks and a row of garages were erected at a total costs of $1,760,159.

The reasons for this application as set out in the affidavit of Linda Ho are as follows. The trustee has consulted a firm of property consultants, Knight Frank Cheong Hock Chye & Baillieu ('Knight Frank') in respect of the property and, in particular, its value and potential and the categories of land use to which the property could be put. Knight Frank has valued the property at $61,500,000 on the basis of residential land which has potential for the development of service apartments. The net rental income from the property, at present, is low, and on the basis that the true market value of the property is $61,500,000, the annual rental return, net of property tax, is about 1%. The trustee has been advised by Knight Frank that the current annual rental yield of first-class residential property in Singapore is in the region of 4.5% to 5% (net of property tax) and that of the first-class commercial property in Singapore is in the region of 4% to 4.5% (net of property tax). The gross rental income (based on the return in 1989) presently derived from the property represents 95% of the total gross rental income of all the immovable properties comprised in the settlement and '73.3% of all the gross income presently accruing to the family settlement', apart from the rental income from rent controlled premises and dividends from stock and shares. As for the categories of land use to which the property could be put, Knight Frank has advised the trustee of the various options open, such as redevelopment of the land alone or in a joint venture with an experienced and reliable developer and retaining some units in the new development or an outright sale of the property and reinvestment of the proceeds of sale in suitable buildings.

There is also the question of rising costs of maintenance which the trustee has considered. The buildings on the property were built in 1953-1954, and as the buildings age further, heavier repair and maintenance

costs would be expected and the rate of such expenses in relation to the rental income would increase with the passage of time, thus further diminishing the net annual rental return from the property.

The trustee has also been advised by Knight Frank that there is a risk of the property being compulsorily acquired by the government, if it is allowed to remain in its present state and without adequate maintenance. The size and location of the property and its present development thereon may make the property a prime target for such acquisition: the existing development is an under-utilization of the land and does not appear to keep pace with the development of other properties in the surrounding area. In addition, the property is adjoining a large plot of state land. All these are risk factors which the trustee has considered. If the property is compulsorily acquired, the compensation payable would be assessed on the basis of the market value of the property as at 1 January 1986, if that market value is lower than its market value at the time of the compulsory acquisition. The current market value of the property greatly exceeds that as of 1 January 1986. Hence, if the property is compulsorily acquired, a great capital loss would result to the corpus.

For these reasons, the trustee is of the opinion that the property should be sold and the proceeds of sale therefrom be reinvested in the purchase of first-class residential and/or commercial properties in Singapore, which are expected to produce a better rental income and which are also likely to attract a rate of increase in the capital value which approximates to that of the property. In carrying out such an exercise, there is likely, unfortunately, to be a time gap between the receipt of the proceeds of sale and the reinvestment thereof in other properties. During this interim period, it is proposed to place the proceeds on deposits with banks or financial institutions. Should the court be disposed to make the order for sale of the property, the trustee applies for Knight Frank to be appointed as the sole marketing agent for the sale of the property upon the terms and conditions proposed by them, which are acceptable to the trustee.

When the application for the substantive order, ie the order authorizing the sale of the property, first came on for hearing, there was no objection, in principle, from the beneficiaries, both the income and the corpus beneficiaries. The main criticisms from the beneficiaries were then mainly these. First, the trustee did not have an adequate valuation of the property. The valuations given by other valuers obtained by the beneficiaries show that the property is worth more than $61,500,000. Some beneficiaries suggested that there should be at least two detailed valuations carried out by independent valuers. Secondly, the trustee has not shown any concrete scheme or plan for reinvestment, and this is extremely important, because under cl 18 of the settlement the trustee is directed not to invest any capital money or accumulation of income in interest bearing securities authorized by law for the investment of trust funds. The trustee, however, is authorized to place capital moneys or accumulations of net income, for the time being not invested as directed by the settlement, with one or more banks in Singapore but shall not demand interest on such moneys on current account or deposit. The trustee may, nevertheless, receive any interest paid on any banking account but such interest so received shall not form part of the income of the settled property or be appropriated to accumulations of income but 'shall from time to time be distributed amongst poor persons of the Mohamedan religion resident in Singapore or elsewhere in any country in such manner as the [trustee] shall think fit'. Hence, during the interim period, ie the period between the sale of the property and the reinvestment of the proceeds of sale, if the proceeds are placed on fixed deposits with banks or financial institutions the interest accruing therefrom cannot be treated as income distributable to the beneficiaries, and thus the income beneficiaries would be deprived of the income which they would otherwise be receiving from the net rental of the property. The income beneficiaries were therefore very concerned of the delay in the reinvestment of the proceeds of sale.

Lastly, some of the beneficiaries objected to the appointment of Knight Frank as the sole marketing agent, and one of the grounds of the objection was that their fees quoted were higher than those quoted by other property consultants. The other objections or criticisms were directed to the manner and methods of conducting the proposed sale, which, for the present moment, I need not consider or set out in any detail.

Though all the parties before me then were agreed, in principle, to the sale of the property, there appeared to be one impediment to my making the order for sale. Under cl 16 of the settlement, which I shall set out and consider in a greater detail in a moment, the trustee is prohibited from applying to court for an order for the sale of the property under 'any law for the time being', which, at present, is s 4 of the Settled Estates Act (Cap 293, 1985 Ed) and s 59 of the Trustees Act (Cap 337, 1985 Ed). Notwithstanding this prohibition, all counsel representing the parties before me submitted that under these statutory provisions, I have the power to make the order, should it be 'considered proper and consistent with due regard for the interests of all parties entitled under the settlement].' Nevertheless, I entertained grave doubt on this point in view of s 6 of the Settled Estates Act, which I shall also set out and consider in a greater detail in a moment. I was therefore not satisfied that I could make an order under s 4 of the Settled Estates Act or s 59 of the Trustees Act. Accordingly, I directed all

counsel to consider and make further research on this point and provide me with written submissions thereon. I also directed the trustee to consider and put forward a definite and concrete scheme or plan for reinvestment of the proceeds from the sale of the property, should I be disposed to make an order authorizing the sale. I then adjourned the application for further hearing on a date to be fixed.

Since then, written submissions have been furnished to me by counsel respectively. Counsel for the trustee, the first defendant and the fourth defendant, and the ninth defendant unanimously maintain that I have the power to make an order authorizing the sale of the property under s 4 of the Settled Estates Act, and that s 6 does not restrict my exercise of that power. The written submission of counsel for the second defendant is, however, at variance with the stand previously taken. He submits that the combined effect of s 4(1) and s 6 of the Act is that the court is only empowered to order a sale of a settled property to the extent that the settlor does not express a contrary intention in the settlement, and that in this case cl 16 of the settlement discloses that contrary intention in that it expressly forbids the trustee to apply to court for an order for the sale of a settled property under the applicable law for the time being in force. He argues, therefore, that by reason of s 6 and cl 16, I have no power to make an order for the sale of the property. This change of view was confirmed subsequently by the second defendant in his affidavit in which he said that he and the beneficiaries whom he represents had reconsidered in detail the plaintiff's application and had rethought their position and they formally withdrew their approval in principle to the proposed sale. Accordingly, at the continued hearing of the application, counsel representing the second defendant opposed the making of an order for sale, contending that I am not empowered to order the sale of the property. The third, seventh and eighth defendants, who are not legally represented, also opposed the making of the order. Hence, the application has become a contested one.

The issue before me is one of law, and that is whether I have the power to order the sale of the property under s 4 of the Settled Estates Act or under s 59 of the Trustees Act, and this issue turns largely on the true construction of s 6 of the Settled Estates Act and cl 16 of the settlement. Before I proceed to consider these statutory provisions and cl 16, I should dispose of two preliminary points. The first is whether the settlement is a settlement within the meaning of the Settled Estates Act. Though the question was not raised, nor was it disputed, I should resolve it at this stage. The term 'settlement' is defined in the Act as follows:

> 'Settlement' means any statute, deed, agreement, will or other instrument, or any number of such instruments, under or by virtue of which any immovable property, or any estates or interests therein, stand limited to, or in trust for, any person or persons, by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively.

The settlement is certainly a deed or an instrument under which the immovable properties comprised therein stand limited to or in trust for persons by way of succession. The immovable properties described therein were declared to be held by the trustees in trust for the settlor during his life, and after his death, in trust, as to the income therefrom, for the income beneficiaries during the period of settlement and thereafter in trust for the corpus beneficiaries: see cll 1 to 6 of the settlement, which, as there is no dispute on the point, it is unnecessary for me to set out in any detail.

The next point is whether the property is part of the 'settled estates' within the meaning of the Act. The term 'settled estates' is defined in s 2 as follows:

> 'Settled estates' means all immovable property and all estates or interests therein, which are the subject of a settlement, and includes any immovable property of or to which an infant is seised or entitled in his own right.

Whether the property is 'the subject of the settlement' depends on whether it is a 'settled property' within the meaning of cl 1 of the settlement. The term 'settled property' is defined in cl 1 as follows:

> the immovable property specified in the First Schedule hereto and in the Second Schedule hereto and capital moneys arising from the compulsory purchase or acquisition of the said immovable property or any part thereof or under any policy of insurance against fire or otherwise and also any immovable property purchased with such moneys or acquired in exchange by the trustees.

According to the trustee, the property was purchased in 1952/1953 by the then trustees with capital moneys arising from the compulsory purchase or acquisition of a settled property: see para 4 of the affidavit of Linda Ho affirmed on 12 April 1990, to which I have adverted. It appears that this fact is disputed by counsel for the first defendant. According to counsel, the property was purchased by the then trustees pursuant to the order of court dated 14 January 1952, made in Originating Summons No 193 of 1951 from funds realized from the sale of certain immovable properties comprised in the settlement. This order did authorize the sale of 'a portion or portions of the settled property' for the purpose of raising a sum not exceeding $2,500,000 to be expended in the purchase of the land at Orange Grove Road 'being TS XXV lot 62/2' for $500,000 and in the construction thereon of building 'at an approximate cost of $1,735,000'. Counsel submits that on the true construction of cl 1 on the definition of 'settled property' the words 'acquired in exchange by the trustees' at the end thereof mean acquired in exchange 'in relation to a compulsory acquisition/purchase of the settled property and not otherwise'. That being so, the

property does not, in counsel's submission, come within the meaning of settled property as defined in cl 1 of the settlement and is not a settled property. Assuming that the construction of cl 1 as contended by counsel is correct, it is not clear, however, whether the sale as authorized by the order was in relation to any compulsory purchase or acquisition of a portion or portions of the settled property. The full circumstances of the application for the order were not disclosed. The ninth defendant, on the other hand, while accepting the fact that the property was purchased from funds realized from the sale of some immovable properties comprised in the settlement, submits that the words 'acquired in exchange by trustees' have a broader meaning and that the property so acquired is property 'acquired in exchange by the trustees', and thus is a settled property. I am inclined to accept the broader construction advanced by the ninth defendant. At any rate, in my opinion, whether the property was acquired out of the capital moneys from a compulsory purchase or acquisition of an immovable property comprised in the settlement or from the proceeds of sale of some immovable properties comprised in the settlement, the property is part of the settled property within the meaning of cl 1 of the settlement. Since its acquisition the property has been treated by all the parties concerned as a settled property, and in particular the rental income from the property has been treated as income and distributed in accordance with the trusts under the settlement. It is therefore not open to counsel for the first defendant to contend that the property is not a settled property. I am therefore unable to accept his submission. In my judgment, the property is part of the settled property as defined in cl 1 of the settlement and part of the 'settled estates' within the meaning of s 2 of the Settled Estates Act.

I now turn to the main issue before me. I propose to consider first ss 4 and 6 of the Settled Estates Act, which set out the power of court in relation, inter alia, to the sale of immovable property comprised in a settlement, and in that connection the relevant provisions of the settlement to see if there is any prohibition or restriction, express or implied, on the exercise of such power. Next, I shall consider s 59 of the Trustees Act, which also confers on the court certain powers in the management or administration of property vested in trustees and determine whether it has any application in relation to the settlement. Lastly, I shall consider whether the decision in *Chapman* v *Chapman*[1] is applicable here, since it has been cited and relied upon by counsel for the second defendant and counsel for the fourth defendant.

Before I set out the texts of ss 5 and 6 of the Settled Estates Act, it is helpful to trace the origin of these two sections. Their source is ss XI and XXVII respectively of the Settled Estates Act 1856, 19 & 20 Vict c 120 in England, which were subsequently updated and reproduced in ss 16 and 39 respectively in the consolidating Act, the Settled Estates Act 1877, 40 & 41 Vict c 18, and these provisions are as follows:

> 16 It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to authorize a sale of the whole or any parts of any settled estates or of any timber (not being ornamental timber) growing on any settled estates, and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the Court for the time being is or shall be required in the sale of lands sold under a decree of the Court.
>
> 39 Nothing in this Act shall be construed to empower the Court to authorize any lease, sale, or other act beyond the extent to which in the opinion of the Court the same might have been authorized in and by the settlement by the settlor or settlors.

There is, in addition, one other section in the Act which it is relevant to mention here, and that is s 38 which provides:

> The court shall be at liberty to exercise any of the powers conferred on it by this Act, whether the Court shall have already exercised any of the powers conferred by this Act in respect of the same property or not; but no such powers shall be exercised if an express declaration that they shall not be exercised is contained in the settlement: Provided always, that the circumstance of the settlement containing powers to effect similar purposes shall not preclude the Court from exercising any of the powers conferred by this Act, if it shall think that the powers contained in the settlement ought to be extended.

At the time of the execution of the settlement by the settlor, the relevant statute on settled estates was Cap XLIX of the Civil Procedure Code (No XXXI of 1907). The provisions in that chapter were modelled on the English Settled Estates Act 1877, and the provisions of ss 1041 and 1043 were substantially similar to those of ss 16 and 39 of the English Act. Chapter XLIX, however, did not incorporate, inter alia, s 38 of the English Settled Estates Act 1877. The Civil Procedure Code (with the exception of those provisions relating to proceedings in the district court) was repealed by the Courts Ordinance 1934, and Cap XLIX of the Code was amended and re-enacted by the Settled Estates Ordinance 1934, which also did not contain the equivalent of s 38 of the English Settled Estates Act. The Ordinance is now the Settled Estates Act (Cap 293, 1985 Ed), and ss 4 and 6 of the Act (which are set out below) are in every respect identical with ss 1041 and 1043 respectively of Cap XLIX of the Civil Procedure Code (in force at the time of the execution of the settlement).

I consider first s 4 of the Settled Estates Act, which so far as relevant, is as follows:

> (1) The court or a judge, if it is considered proper and consistent with due regard for the interests of all parties entitled under the settlement, may from time to time au-

thorize a sale of the whole or any part of any settled estates, to be conducted and confirmed in the same manner as a sale of lands sold under a judgment of the court.

(4) On every sale under this Act the court or a judge may direct what person or persons shall execute the deed of conveyance.

(5) The deed, executed by such person or persons, shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale.

This section by itself is clear; it confers on the court or a judge a power to authorize the sale of the whole or any part of the settled estates, and the exercise of this power is governed only by the following consideration: if it is considered proper and consistent with due regard for the interests of all parties entitled under the settlement. Apart from this, s 4 does not contain any limitation on the exercise of such power.

Next, I turn to s 6, which is as follows:

The court shall not authorize any sale or other act beyond the extent to which, in the opinion of the court, the same might have been authorized in and by the settlement, by the settlor or settlors.

It is clear to me that this section contains a limitation on the exercise by the court or a judge of, among other things, the power of sale conferred by s 4, and the limitation is the extent to which, in the opinion of the court, the sale of the settled property might have been authorized in and by the settlement by the settlor. It is therefore necessary to examine the settlement and determine the extent of such power, which, in my opinion, might have been authorized in and by the settlement by the settlor.

The relevant provisions of the settlement are cll 7 and 16, which are as follows:

7 The trustees shall during the life of the settlor manage or superintend the management of the settled property subject to the directions of the settlor and shall at the settlor's request demise any part of the settled property for any term of years on building or repairing leases or otherwise and generally conform to the directions of the settlor and shall during the settlor's life pay the rents or income to the settlor or permit him to receive the same and after the death of the settlor during the residue of the period of the settlement the trustees shall manage or superintend the management of the settled property with power to erect, pull down, rebuild, add to and repair houses and other buildings and to drain and make roads and fences and otherwise to improve all or any part of the settled property and to insure houses and buildings or rents against loss or damage by fire or other risks and to make allowances to or arrangements with tenants to condone breaches of covenant, and to accept surrenders of leases and tenancies and to grant leases or agreements for leases on such terms as the trustees shall think fit for any period not exceeding five years from the date thereof and generally to deal with the settled property as if they were absolute owners thereof without being responsible for any loss but *so that nothing in this clause contained shall be deemed to empower the trustees except as hereinafter provided to sell or to mortgage or create any charge on the settled property* and so that the trustees shall be under no obligation to insure buildings or rents against fire or other risks and shall not be responsible for non-insurance.

16 *The trustees shall not apply to the court for an order for the sale of the settled property under Cap XLIX of the Civil Procedure Code or any law for the time being* but in the event of the compulsory purchase or acquisition of any part of the settled property the trustees shall have power to receive and give a good discharge for the purchase money or compensation moneys and may agree the amount of the compensation payable and on receipt of any notice of acquisition or compulsory purchase agree to sell the property to be acquired to the Government Municipal Commissioners or Singapore Improvement Trust or other body entitled by law to purchase or acquire the same compulsorily and in the event of any part of the settled property being included in any improvement scheme may agree to give or take other land in exchange for any of the settled property which is to be acquired and may allow or receive moneys by way of equalizing the exchange in the same manner as if the trustees were absolute owners of the settled property and the trustees shall also have power to surrender leases or grants in exchange for new leases or grants. (Emphasis added.)

By cl 7, the trustees are empowered to manage and superintend the management of the settled property with power to erect, pull down, rebuild, add to and repair houses or other buildings. Having vested in the trustees such powers of management, the said clause goes on expressly to say that the clause does not confer on the trustees, among other things, the power to sell the settled property, except as thereinafter provided. The only provision thereinafter provided, which empowers to a limited extent the trustee to sell the settled property, is cl 16. Clause 16 starts with an express prohibition that the trustees shall not apply to court under any law in force 'for an order for the sale of the settled property', and that is followed by a provision enabling the trustees to sell the settled property upon a compulsory purchase or acquisition to the government or a body entitled in law to purchase or acquire it compulsorily. By these provisions, the settlor made his intentions abundantly clear: he put it beyond question that, except to a limited extent, the trustees have no power to sell the settled property, and further the trustees are forbidden to invoke the jurisdiction of the court and seek an order for sale of the settled property. The limited extent is a sale in the event of a compulsory purchase or acquisition of the settled property, or sale in connection with such purchase or acquisition. That is the only extent, to which a sale is authorized in and by the settlement by the settlor. Beyond that, in my opinion, a sale of the settled property is not authorized. In the instant case, an outright sale of the property as proposed by the trustee is not the extent which, in my opinion, might have been authorized in and by the settlement by the settlor, though the purpose of such sale is to reinvest the proceeds in higher yielding com-

mercial or residential property in terms of income. In my judgment, the court, by reason of s 6 of the Settled Estates Act and cl 16 of the settlement, cannot exercise the power under s 4 and order the sale of the property.

Counsel for the trustee mounts a two-pronged argument in support of the application. First, he submits that cl 16 of the settlement does not operate as a prohibition against the sale of the settled property and that it operates only as a prohibition to the trustee from applying to court for an order for sale and in that respect it is ineffectual, because s 7 of the Settled Estates Act expressly confers on the trustee a right to apply to court. Secondly, he submits that as the Settled Estates Act does not have a provision corresponding to s 38 of the Settled Estates Act 1877 of England, the court can exercise the power of sale under s 4, even if cl 16 is construed as a prohibition against the sale of the settled property; there is nothing in the Act which says that the court shall not exercise the power under s 4, if there is an express prohibition against the exercise of such power or an express declaration that such power shall not be exercised. I am unable to accept both limbs of his argument. In respect of the first limb, I am unable to give to cl 16 such literal construction as contended by counsel. In the context of the settlement, and in particular cl 7, the prohibition in cl 16 has a much wider implication: it means that the settlor did not intend that a sale of the settled property should be made, except in limited circumstances, with or without the assistance of the court. In my opinion, cl 16 operates as a prohibition against a sale of the settled property, except a sale in the case of a compulsory purchase or acquisition thereof.

As for the second limb of the argument, it seems to me that in view of s 6 of the Settled Estates Act and cl 16 of the settlement, a provision such as s 38 of the English Settled Estates Act 1877 does not really perform any useful function. As I have construed it, s 6 operates as a limitation on, inter alia, the exercise of the power under s 4 of the Act, and the limitation of such power is the extent to which, in the opinion of the court, a sale might have been authorized in and by the settlement by the settlor. Where a settlement contains a prohibition, express or implied, against the sale of the settled property, it must follow that by virtue of s 6, the court cannot under s 4 make an order for sale, because such an order would go beyond the extent which might have been authorized in and by the settlement by the settlor.

It should be borne in mind that the terms of the settlement were drafted and settled at the time when Cap XLIX of the Civil Procedure Code 1907 was in force. The settlor and those advising him, particularly the latter, were well aware that Cap XLIX was modelled on the English Settled Estates Act 1877 and that Cap XLIX did not contain the equivalent of s 38 of the English Act. They must have considered the implication and effect of the absence of such provisions in Cap XLIX. With this in mind, they very astutely avoided adopting a provision which either prohibits the court from exercising the power under s 1041 of Cap XLIX (which was the antecedent of s 4 of the Settled Estates Act) or declares that no such power shall be exercised, obviously for fear that such a provision might well be construed as repugnant to or as an ouster of the statutory jurisdiction of the court and therefore would be or might be declared void. Instead, they drafted a prohibition in cl 16, which operates *in personam* against the trustees, forbidding them to apply to court for an order for the sale of the settled property. It seems to me that the intention of the settlor is clear: it is to prohibit the trustees from selling the settled property with or without the assistance of the court, except in a very limited way.

Counsel for the first defendant submits that the origin of s 6 of the Settled Estates Act is s 39 of the English Settled Estates Act 1877 and the *raison d'etre* for the existence of s 39 is the proviso to s 38. That seems to me to be correct, and, at the risk of repetition, it is helpful to set out again ss 38 and 39 but this time in their proper sequence so that the latter can be seen in its proper context:

> 38 The Court shall be at liberty to exercise any of the powers conferred on it by this Act, whether the Court shall have already exercised any of the powers conferred by this Act in respect of the same property or not; but no such powers shall be exercised if an express declaration that they shall not be exercised is contained in the settlement: *Provided always, that the circumstance of the settlement containing powers to effect similar purpose shall not preclude the Court from exercising any of the powers conferred by this Act, if it shall think that the powers contained in the settlement ought to be extended.*
>
> 39 Nothing in this Act shall be construed to empower the Court to authorize any lease, sale, or other act beyond the extent to which in the opinion of the Court the same might have been authorized in and by the settlement by the settlor or settlors. (Emphasis added.)

The proviso, counsel submits, refers to a situation where there are express powers under the settlement 'to effect similar purposes' and in such situation the court is still empowered to exercise the powers under the Act. But immediately following that is s 39 which seeks to prevent the court from exercising its statutory powers in excess of the existing powers provided in the settlement. Section 39 is therefore not intended to apply to a situation where there is a prohibition such as that in the settlement. On that basis, counsel submits that s 6 (which is derived from s 39) is intended to apply only to cases where there are present in the settlements powers of sale and governs the extension of such powers by the court exercising the statutory powers and not to a case, such as the present one, where there is no power of sale

contained in the settlement and there is present a prohibition as contained in cl 16. In short, in his submission, s 6 has no application in the present situation. Such a construction, he argues, is consistent with the intention of the Settled Estates Act, which is to cure the mischief of a strict settlement of settled properties, including that of inalienability.

There is certainly some force in this argument. I accept that s 6 is derived from or modelled on s 39 of the English Settled Estates Act 1877. However, the original provision has been recast in more mandatory terms, namely, 'The Court shall not authorize . . . ' and has been reset in a different context in our Settled Estates Act: it follows immediately ss 4 and 5 (the latter relates to the power of granting leases), and there is no such proviso as that in s 38 of the English Act of 1877, which precedes s 6. Therefore, clearly, s 6 has to be read and construed in a context different from that in which s 39 of the 1877 Act was to be read and construed. Read in the context of our Act, s 6 contains a limitation on, inter alia, the exercise of the power of sale under s 4. I am therefore unable to accept the contention of counsel for the first defendant.

I now turn to the submission of counsel for the fourth defendant, who also supports the application for an order for sale of the property. He submits that the correct construction of s 6 is that the court's power to authorize a sale is limited to what in the court's opinion it considers the settlor might have authorized 'had the settlor been alive' at the date of hearing, and I take it that from this it follows that 'had the settlor been alive' today he would have agreed, in the circumstances, to the sale of the property. I am unable to accept this argument; that, in my opinion, is not the meaning of s 6. The limit laid down in the section is 'the extent to which, in the opinion of the court, the [sale] might have been authorized *in and by the settlement*, by the settlor'. To consider the extent to which the sale might have been authorized one must examine the terms of the settlement to see what might have been authorized therein and thereby by the settlor, and in carrying out such an exercise one must have regard to cll 7 and 16 of the settlement; and if on the true construction of cl 16 the prohibition operates as one against a sale of the settled property, as I think it does, then it is not possible to say the extent to which the sale might have been authorized in and by the settlement by the settlor.

I now turn to s 59 of the Trustees Act which provides:

> (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.
>
> (2) The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.
>
> (3) An application to the court under this section may be made by the trustees, or by any of them or by any person beneficially interested under the trust.

However, the exercise by the court of this power is limited by s 2(2) of the Act which provides:

> The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply *if and so far only as a contrary intention is not expressed in the instrument*, if any, creating the trust, and have effect subject to the terms of that instrument. (Emphasis added.)

On the true construction of cl 16, there is a contrary intention expressed in the instrument against a sale of the settled property, and the power in s 59 of the Trustees Act is therefore not available.

Finally, I turn to the leading case of *Chapman* v *Chapman*[1] which is relied upon by counsel for the second defendant and counsel for the fourth defendant but each in a different way. There, the House of Lords in affirming the decision of the Court of Appeal held that the court had no inherent jurisdiction in the execution of trusts of a settlement to sanction, on behalf of infant beneficiaries and unborn persons, a rearrangement of the trusts for the purpose of securing what, in the words of Lord Simonds LC, was 'an adventitious benefit' which in that case was an avoidance of estate duty which would or might otherwise be payable in respect of the trust funds.

Counsel for the second defendant submits that cl 16 on the true construction operates as a prohibition against the sale of any part of the settled property and if the court is to exercise the power of sale under s 4 of the Settled Estates Act and order the sale of the property, it would be varying the trusts of the settlement, and that as a general rule the court has no inherent jurisdiction to vary the trusts of a settlement, except in three classes of cases, none of which are applicable to the instant case. In support, he relies heavily on *Chapman* v *Chapman*. He quoted various passages from the speeches of the House of Lords but the passage which is most concise and apt in support of his argument is the following from the speech of Lord Asquith of Bishopstone, at p 469:

In practice, Courts of Chancery have asserted this jurisdiction mainly, if indeed not solely, in three classes of cases:

(a) Where the trust dispositions have provided for accumulations of income in favour of an infant during his minority without providing for his maintenance during that period: but this provision would be stultified if the infant were not maintained while the income was accumulating. The court has in such cases refrained from enforcing the letter of the trusts, and by authorizing maintenance has saved the infant from starving while the harvest designed for him was in the course of ripening.

(b) Where some event or development unforeseen, perhaps unforeseeable, and anyhow unprovided against by the settlor or testator, threatened to make shipwreck of his intentions: and it was imperative that something should be saved from the impending wreck. These are often referred to as the 'salvage' cases: and many of the 'maintenance' cases which I have classified separately could properly be subsumed under this wider class.

(c) Where there has been a compromise of rights (under the settlement or will) which are the subject of doubt or dispute.

Having set out these three exceptions, Lord Asquith then continued, at pp 469 to 470:

I would venture to record my view that the inherent jurisdiction of the Court of Chancery in this sphere is limited to these three classes of cases: 'maintenance' cases, 'salvage' cases, and 'compromise' cases: and that the court's exercise of jurisdiction in these three spheres is limited to those spheres and is not simply the exercise in particular circumstances of the far wider jurisdiction claimed for the court by counsel for the appellants . . .

Counsel for the fourth defendant also refers to *Chapman* v *Chapman* but he relies on exception 2 to the general rule, the 'salvage' case referred to by Lord Asquith, which he terms 'emergency', and submits that the court is entitled to depart from the trusts of the settlement in the case of an 'emergency', and that in this case an 'emergency' has arisen in that, on the basis of the facts and the advice given by Knight Frank, there is a risk that the property would be compulsorily acquired by the government, and in particular over the recent months large areas of residential properties at Gallop Road and other residential areas had been compulsorily acquired by the government.

In my opinion, the general rule and the exceptions on the inherent jurisdiction of the court to vary the trusts of a settlement as adumbrated in *Chapman* v *Chapman* are of no application here. The trustee is not invoking the inherent jurisdiction but the statutory jurisdiction under s 4 of the Settled Estates Act and s 59 of the Trustees Act. At any rate, on the view I take of cl 16 of the settlement and s 6 of the Settled Estates Act, it is not necessary to consider the general rule or the exception. Neither is applicable.

In my judgment, by reason of cl 16 of the settlement and s 6 of the Settled Estates Act, I am not empowered under s 4 of the Act to make an order for the sale of the property. Section 59 of the Trustees Act, by reason of s 2(2) of that Act and cl 16, also does not empower me to make such an order. In the result, I dismiss the application. I now wish to hear argument on costs.

Application dismissed.

Solicitors: *Allen & Gledhill; Abraham Low & Partners; Harry Elias & Partners; Wee Swee Teow & Co; Michael Khoo & BB Ong.*

Reported by *Terence Tan Bian Chye*

Drilex Systems Pte Ltd v Registrar of Companies & Anor

HIGH COURT (SINGAPORE) — ORIGINATING MOTION NO 78 OF 1989
CHAN SEK KEONG J
12 NOVEMBER 1990

Companies and Corporations — Registration of name by foreign company — Whether name identical with another local company — Test of avoidable confusion — Appeal against registrar's decision — Companies Act (Cap 50, 1988 Ed), ss 27, 368, 369 & 378

This was an appeal by the plaintiffs against the decision of the registrar to register the second defendants' name as 'D Inc'. The plaintiffs were a local company named 'D Pte Ltd' and the second defendants were a foreign multi-national company registered in Singapore under the name 'D Inc'.

The disputes were that the two names so resembled each other that one was likely to be mistaken for the other, that the businesses of the two parties were similar and that the plaintiffs had suffered and would likely suffer damage as a result of confusion of the plaintiffs' identity with that of the second defendants' due to the registration.

The reasons for the registrar's decision against which the appeal was brought was that the businesses of the two parties were obviously in different industries, the use of the word 'Inc' would alert the business community of the difference and the nature of the entity they were dealing with and further, to require a foreign company to use a name other than its registered name in its country of origin would cause confusion and was undesirable.

The plaintiffs contended that by virtue of s 27, the registrar had no power to register a name which was identical with or so resembled that of a Singapore company that there would be confusion. The second defendants contended that s 27 applied to Singapore companies only and s 378 was the provision applicable to foreign companies.

The plaintiffs further argued that aside from the tests of resemblance and public interest, undesirability was the sole criterion for the exercise of the registrar' discretion to register a name and that avoidable confusion in the identity of the two companies was obviously undesirable.